

DATE: December 3, 1998

In Re:

Senate Forwarding, Inc.

Claimant

)
Claims Case No. 98092827

CLAIMS APPEALS BOARD DECISION

DIGEST

For a Code 5 shipment, the government offered a 50% compromise liability when it could not be determined if the loss or damage to the household goods occurred in the custody of the government or the carrier. When the carrier did not promptly pay the 50% liability, the Service correctly offset the full amount of liability.

DECISION

Senate Forwarding, Inc. (Senate) appeals the September 8, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 98072701, which affirmed the Navy's set off of \$294.00 for transit loss and damage to the household goods shipment of a service member.⁽¹⁾

The record indicates that Senate's agent picked up the member's household goods from Colorado in June 1995 and another agent of Senate delivered them to the member in Iceland in August 1995. The shipment was a Code 5 shipment.⁽²⁾ Upon delivery, the member and the delivering agent signed a Joint Statement of Loss or Damage At Delivery (DD Form 1840). In October 1995, the Navy dispatched a Notice of Loss or Damage (DD Form 1840R).

A Demand on Carrier was sent to Senate for \$294.00 in January 1996. Subsequent letters were sent by the Navy explaining that Senate's full liability was \$294.00 and the Code 5 liability was \$147.00, which was an acceptable settlement if received within 120 days of January 26, 1996. Senate responded to the Demand in March 1996 with a denial of liability. The Navy did not concur with Senate, and a settlement was not reached. The Defense Finance and Accounting Service (DFAS) set off the full \$294.00: \$144 for a missing carpet, Item #291; \$65 for fraying and a tear on a red fabric chair, Item #5; \$50 for a broken wooden handle to a hutch, Item #60; and \$35 for a broken frame to a wicker chair, Item #62.

The Navy's administrative report states that the delivery revealed serious defects in the packing and containerizing performance by the packer, resulting in missing and broken items. The report concludes that the damages claimed were the result of this negligence by the packers. Our Settlement Certificate upheld Senate's full liability for the damages and loss after determining that tender of the carpet was established and that the carrier had not presented any evidence to show that the amounts that were offset for the other items were unreasonable.

In its appeal, Senate argues that the government cannot raise the carrier liability to one hundred percent based on the Service personnel's statement that the cause of the damage and loss was seriously defective packing. Senate states that if an item, such as the carpet, is alleged to be missing, the issue of defective packing is moot. Senate also contends that there has been no evidence of one hundred percent possession by the carrier of the carpet at the time of loss. Senate believes that there has been no reported damage to the hutch which would support transit damages. When and how the damage occurred to the bracket underneath the wicker chair has not been established, according to Senate, nor has it been determined who had possession of the chair when the alleged crack occurred. Regarding the red fabric chair, Senate contends that the damage claimed, frayed material, is synonymous with the damage noted on the inventory,

"badly worn".

Discussion

A *prima facie* case of carrier liability is established by a showing that the shipper tendered property to the carrier, that the property was not delivered or was delivered in a more damaged condition, and the amount of damages. *See Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). The burden of proof then shifts to the carrier to rebut the *prima facie* liability.

We first will consider the issue of this having been a Code 5 shipment and the appropriate amount of carrier liability. Carriers are relieved from liability for loss or damage on Code 5 shipments when the carrier can reasonably establish that the loss or damage occurred while the shipment was in the custody and control of the Government. With such shipments, the Government may offer a compromise of 50% of the amount it determines to be due when it cannot readily be determined whether the loss or damage occurred while the shipment was in the custody and control of the carrier. *See International Personal Property Rate Solicitation I-6*, Headquarters Military Traffic Management Command, effective April 1, 1995. The offer of compromise is predicated upon prompt acceptance and payment of the Government offer. In the event the carrier does not accept the Government's adjudication of a particular claim falling within this category, then normal negotiating procedures will apply and the 50% compromise agreement will not be applicable.

In the present case, the Navy offered a compromise of 50% liability for the loss and damage to this shipment; however, when Senate did not accept the Navy's adjudication of the claim, the offer to compromise was no longer applicable. The Navy correctly suspended the compromise in this situation because Senate disputed the amount claimed instead of paying 50% promptly. *See Swift International, Inc.*, B-257612, Jan. 25, 1995 and cases cited therein. Senate's argument on appeal that one hundred percent possession by the carrier at the time of loss or damage has not been proved is irrelevant. The proper question is whether the carrier has demonstrated that loss and damage occurred while the shipment was in the government's possession. Since the carrier has not presented such evidence here, the carrier is responsible as the last handler. *Compare* DOHA Claims Case No. 96080202 (November 21, 1996); DOHA Claims Case No. 96070210 (September 19, 1996); and *McNamara-Lunz Vans and Warehouses, Inc.*, 57 Comp. Gen. 415, 417 (1978). We will now look at the particular items in dispute.

Regarding the carpet, Senate argues that its receipt of a copy of the purchase receipt from this Office was untimely given the fact that Senate had requested a copy from the Navy. The record contains a June 8, 1998, letter from the Navy to Senate which states that a copy of the receipt was included with the Demand on Carrier in January 1996 and another copy was enclosed with the June letter. We agree with the Settlement Certificate that given the totality of the evidence in the record, the shipper has provided a *prima facie* case of liability for the carpet. Tender is established by the inventory identification of Item #291 as six carpets, the shipper's statement that he saw the carpet packed, and a copy of the purchase receipt for the carpet. Evidence that this tendered property was not delivered is the shipper's notification at the time of delivery that one carpet was missing. Senate's mere contention that the issue of defective packing of the carpet is a moot issue does not overcome the *prima facie* case of liability for the missing carpet. *See* DOHA Claims Case No. 97102410 (December 23, 1997).

We disagree with Senate's contention for the remaining items that because the damage claimed was other than chips, gouges, or scratches, that transit-related damage has not been established. A *prima facie* case of liability has been established for each of the items, and Senate has not provided evidence to overcome that liability. We note that Senate did not conduct an inspection of the damage to items in this shipment. On appeal, Senate merely makes unfounded statements in support of its denial of liability. Senate's statements that the wicker chair was of weak construction and that the location of the damage (underneath the seat) would not be readily visible to unpackers, do not overcome the *prima facie* case of liability for the damage to the frame of the wicker chair. Similarly, Senate's argument that the shipper's claim that the red fabric chair was frayed identifies the pre-existing damage listed on the inventory as badly worn does not overcome Senate's liability for the tear in the fabric on the chair. Senate also provides no evidence that supports its argument that the damage claimed to the hutch was not transit related.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading (PPGBL) VQ-068,670; Navy Claim No. 96-097; and carrier claim number 097-96.

2. A Code 5 shipment is the movement of household goods in Military Traffic Management Command-approved door-to-door shipping containers whereby a carrier provides line-haul service from origin residence to a military ocean terminal, the government provides ocean transportation to the designated port of discharge, and the carrier provides line-haul service to the destination residence. *See* Air Force Instruction 51-502, *Personal Government Recovery Claims*, para. 3.4.2.1. (July 25, 1994).